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No. 02-1183

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

SAMUEL FRANCIS PATANE

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE TENTH CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

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## REPLY BRIEF FOR THE UNITED STATES

The *Miranda* rule requires the exclusion of unwarned statements resulting from custodial interrogation, in order to guard against the risk that a defendant's compelled statement will be introduced by the government to prove his guilt. Respondent and his amici urge that the exclusionary rule of *Miranda* now be greatly extended to encompass suppression not only of the unwarned statement, but also of reliable physical evidence derived from the unwarned statement. This Court has not previously taken that step, and it should decline to do so here.

It is not the premise of *Miranda* that all unwarned statements provided during custodial interrogation have actually been compelled, such that their introduction into evidence would necessarily violate the Fifth Amendment. Rather, *Miranda* responds to the "unacceptably great" risk of intro-

ducing a compelled statement. *Dickerson* v. *United States*, 530 U.S. 428, 442 (2000). *Miranda* thus creates a limited exclusionary rule to protect the Self-Incrimination Clause's core right. When uses of unwarned statements in other contexts are at issue, the Court has relied on the traditional totality of the circumstances test to measure whether the statement is voluntary. That analysis, as well as the overwhelming weight of authority in the courts of appeals both before and after *Dickerson* rejecting a rule requiring suppression of derivative physical evidence, makes clear that "[t]he exclusion of unwarned statements, when not within an exception, is a complete and sufficient remedy." *Chavez* v. *Martinez*, 123 S. Ct. 1994, 2013 (2003) (Kennedy, J., concurring in part and dissenting in part).

Even if respondent were correct that *Miranda* should be viewed as a rule governing the conduct of the police and that the exclusion of unwarned statements taken in custodial interrogation is based on a deterrence rationale, there still would be no justification for extending the *Miranda* exclusionary rule to derivative physical evidence. The additional damage done to the truthseeking function of the criminal trial would be profound, and it is not justified by the limited incremental deterrence that would be achieved. The exclusion of the accused's unwarned statements is strong enough medicine for a rule that operates without actual proof of the "compelled" testimony that the Fifth Amendment addresses. No adequate justification exists for extending *Miranda* further at this late date.

### A. The *Miranda* Rule Protects Against A Core Violation Of The Self-Incrimination Clause—The Introduction Of A Compelled Statement At Trial

Respondent notes (Br. 13-15) that in the immunity context, the Self-Incrimination Clause requires the suppression not only of compelled statements, but also of evidence de-



rived from such statements. See, *e.g.*, *United States* v. *Hubbell*, 530 U.S. 27, 37 (2000); *Kastigar* v. *United States*, 406 U.S. 441, 444-445 (1972). Respondent then argues (Br. 15) that because the constitutional rule of *Miranda* is based on the Self-Incrimination Clause, "the derivative evidence rule applies" in that context too. See also Brennan Center Amicus Br. 17-19; NACDL Amicus Br. 16-17.

1. Respondent's argument disregards the distinctly different function of *Miranda*, on the one hand, and rules excluding evidence derived from compelled testimony, on the other. *Hubbell* and *Kastigar* address the scope of immunity when the government directly compels testimony or requires the defendant to engage in testimonial acts of production. When the government compels such testimony or testimonial acts, the Fifth Amendment rule is settled that the government may not obtain an evidentiary advantage based on its having required production of the testimony before trial, and the testimony and its fruits therefore must be suppressed. See U.S. Br. 25.

2. *Miranda* cases differ from *Hubbell* and *Kastigar*, because "the breach of the *Miranda* procedures * * * involve[s] no actual compulsion." *Oregon* v. *Elstad*, 470 U.S. 298, 308 (1985); see *id.* at 306-307 n.1 (failure to give warnings "does not constitute coercion"), 310 ("The failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced."). Rather than establishing that unwarned confessions are in fact compelled, the *Miranda* rule protects against "the *risk* of overlooking an involuntary custodial confession." *Dickerson*, 530 U.S. at 442 (emphasis added); see also *id.* at 435 ("the risk that an individual will not be 'accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself'"); *Chavez*, 123 S. Ct. at 2007 (Souter, J., concurring in the judgment) (*Miranda* rule "express[es] a judgment that the core guarantee, or the judicial capacity to

protect it would be placed at some risk in the absence of such complementary protection"). Unlike the rules in *Hubbell* or *Kastigar*, the rule in *Miranda* does not concern statements that have been formally compelled, but rather responds to judicial limitations on the ability to detect whether such compulsion has occurred in custodial interrogation.

Because the *Miranda* rule protects against the risk that a compelled statement will not be detected, its scope is narrower than the rules in *Hubbell* or *Kastigar*. The exclusion of statements from the government's case in chief directly responds to the danger to which *Miranda* is addressed. See *Dickerson*, 530 U.S. at 442. When the admission of potentially compelled statements is at issue, the "right protected by the *text* of the Fifth Amendment" is at stake. *Chavez*, 123 S. Ct. at 2004 (plurality opinion) (emphasis added); see also *id.* at 2006 (Souter, J., concurring in the judgment) ("[T]he text of the Fifth Amendment * * * focuses on courtroom use of a criminal defendant's compelled, self-incriminating testimony, and the core of the guarantee against compelled self-incrimination is the exclusion of any such evidence."); *Oregon* v. *Elstad*, 470 U.S. at 316-317 ("If the prosecution has actually violated the defendant's Fifth Amendment rights by introducing an inadmissible confession at trial, compelling the defendant to testify in rebuttal, the rule announced in *Harrison* v. *United States*, 392 U.S. 219 (1968), precludes use of that testimony on retrial.").

Where protection of the core guarantee of the Self-Incrimination Clause is not at stake, however, the calculus is distinctly different. The Court has recognized that, where an unwarned (but voluntary) confession is *not* offered in the case in chief, the cost of suppression—that "a guilty defendant [may] go free as a result" of the loss of reliable evidence, *Dickerson*, 530 U.S. at 444—is too high. Unwarned but voluntary statements may thus be used for impeachment, as in *Harris* v. *New York*, 401 U.S. 222 (1971), and



*Oregon* v. *Hass*, 420 U.S. 714 (1975). And in the few cases in which the Court has addressed arguments for suppressing evidence derived from an unwarned statement, as in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), which involved the admissibility of the trial testimony of a witness discovered as a result of the defendant's unwarned statement, or *Oregon* v. *Elstad*, *supra*, which involved the admissibility of a subsequent, warned statement made by the defendant after he had already made a first, unwarned statement, the Court has rejected such arguments.[1]

In all of those situations, there remains some "risk" that the defendant's statements were actually compelled, but that a court will fail to detect the compulsion. Nevertheless, that risk is addressed in the circumstances of *Harris*, *Hass*, *Tucker*, and *Elstad* by inquiring whether the statements were in fact voluntarily made. It is not addressed by extending *Miranda*'s presumption of compulsion beyond the case in chief. The same approach applies here as well. The admission of reliable physical evidence does not directly threaten the right protected by the Self-Incrimination Clause. See U.S. Br. 27-29, 35-37. The costs to the truth-seeking function of the criminal trial are too high to justify exclusion of reliable physical evidence, when the statements that led to the evidence cannot be shown to have been compelled.

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[1] Respondent argues (Br. 33-42) that *Elstad* and *Tucker* rested on additional points of analysis and can be distinguished factually, but that does not undermine their relevance to the issue in this case. In those cases, the Court refused to extend *Miranda* to require suppression of evidence outside of the government's case in chief, and the premise of the Court's reasoning was the *in*applicability of the fruits doctrine to unwarned statements. See pp. 10, 11-12, *infra*.

### B. The *Miranda* Rule Protects A Right At Trial, And It Does Not Set Forth A Code Of Police Conduct

Respondent argues (Br. 10, 12) that "a violation of *Miranda*'s warning requirement is a violation of the Constitution" and that "*Miranda*'s warning requirement is * * * itself a right protected by the Constitution." See also, *e.g.*, Brennan Center Amicus Br. 12 (a failure to give *Miranda* warnings is "*misconduct* that the [*Miranda*] evidentiary rules are intended to deter"). Respondent concludes from that premise that evidence derived from an unwarned statement must be suppressed at trial to deter such pretrial police conduct, just as the Fourth Amendment's exclusionary rule has been shaped, under *Wong Sun* v. *United States*, 371 U.S. 471 (1963), to deter pretrial police conduct that violates the Fourth Amendment.

1. *Miranda* does provide guidance to the police about the preconditions for admitting statements taken in custodial interrogation. But it is ultimately a trial rule, not a constitutionally mandated regime of police conduct. "[A] simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment." *Elstad*, 470 U.S. at 306 n.1. *Miranda* protects "a fundamental *trial* right." *Withrow* v. *Williams*, 507 U.S. 680, 691 (1993). As the Court explained in *Dickerson*, *Miranda* "held that certain warnings must be given before a suspect's statement made during custodial interrogation *could be admitted in evidence*." 530 U.S. at 431-432 (emphasis added). See *id.* at 435 (noting that the *Miranda* "guidelines established *that the admissibility in evidence* of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings") (emphasis added). Thus, "[t]he rule the Court established in *Miranda* is clear. *In order to be able to use statements obtained during custodial interrogation of the accused*, the State must warn the



accused prior to such questioning of his right to remain silent and of his right to have counsel, retained or appointed, present during interrogation." *Fare* v. *Michael C.*, 442 U.S. 707, 717 (1979) (emphasis added).[2]

The opinions in *Chavez* v. *Martinez*, 123 S. Ct. 1994 (2003), confirm that *Miranda* states a trial rule. *Chavez* involved the question whether a damages action could be brought under 42 U.S.C. 1983 for, *inter alia*, custodial interrogation without prior administration of *Miranda* warnings. The Court therefore confronted the question whether custodial interrogation without administration of *Miranda* warnings itself violates the Constitution. Six Justices concluded that it did not. The plurality opinion written by Justice Thomas explained that *Miranda* is a "prophylactic measure to prevent * * * the admission into evidence in [a] criminal case of confessions obtained through coercive custodial questioning." 123 S. Ct. at 2004. The plurality therefore concluded that the "failure to read *Miranda* warnings [in that case] did not violate [respondent's] constitutional rights." *Ibid.* Justice Kennedy, joined by Justice Stevens, "agree[d] with Justice Thomas that failure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensues." *Id.* at 2013 (Kennedy, J., concurring in part and dissenting in part).

2. The government acknowledged in its opening brief (at 32) that *Miranda* and some of this Court's earlier cases do

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[2] See *Withrow* v. *Williams*, 507 U.S. at 690 ("Unless the prosecution can demonstrate the warnings and waiver as threshold matters, we held [in *Miranda*], it may not overcome an objection to the use at trial of statements obtained from the person in any ensuing custodial interrogation."); *New York* v. *Quarles*, 467 U.S. 649, 654 (1984) ("The *Miranda* Court, however, presumed that interrogation in certain custodial circumstances is inherently coercive and held that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights.").

contain language that could be read as suggesting rules for police conduct independent of the admission of evidence at trial, and respondent cites (Br. 46-47) additional cases along the same lines. Respondent, however, disregards the cases, from *Fare* v. *Michael C.* on, see pp. 6-7, *supra*, that have set forth the *Miranda* rule as one governing the admissibility of the defendant's confessions at trial. In any event, respondent's understanding of the cases he does cite is mistaken.

The issue in each of the cases respondent cites—indeed, the issue in each of this Court's *Miranda* cases before *Chavez*—was whether a statement was admissible at trial. Because that was the only issue before the Court in each case, it was natural for the Court to refer, for example, to "the warnings which must be given prior to in-custody interrogation," *Johnson* v. *New Jersey*, 384 U.S. 719, 726 (1966), without adding the qualification each time that the warnings must be given *if the resulting statement is to be admissible at the defendant's trial.* By the time of *Dickerson*, the understanding of the *Miranda* as a rule of exclusion at trial had become firm. And when the Court in *Chavez* ultimately confronted for the first time the question whether *Miranda* was a trial rule or a rule governing police conduct, six Justices concluded that unwarned custodial interrogation does not itself violate the Constitution.[3]

3. The contrast between this Court's *Miranda* cases and this Court's Fourth Amendment cases illustrates the distinction between constitutional rules whose violation occurs outside the trial and constitutional rules, such as *Miranda*, that are directed at the trial itself. A Fourth Amendment violation undoubtedly occurs outside of court and before trial. The question has therefore frequently arisen whether the need to deter such an out-of-court Fourth Amendment violation justifies excluding the fruit of that violation in a variety of contexts outside a criminal trial. See, *e.g.*, *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357 (1988) (parole revocation hearing); *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984) (civil deportation hearing); *United States* v. *Janis*, 428 U.S. 433 (1976) (civil tax proceedings); *United States* v. *Calandra*, 414 U.S. 338 (1974) (grand jury); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965) (forfeiture proceeding); *Giordenello* v. *United States*, 357 U.S. 480 (1958) (preliminary probable-cause hearing).

Under respondent's view, a *Miranda* violation occurs whenever the police question a suspect in custody without giving *Miranda* warnings. Accordingly, questions analogous to those arising under the Fourth Amendment—questions about whether the need to deter a *Miranda* "violation" requires exclusion of evidence at a wide variety of proceedings outside a criminal trial—would have to be answered with respect to *Miranda* as well. But because the *Miranda* rule protects a right at a criminal trial and violations of the *Miranda* rule could occur only at trial, those questions have by and large not arisen. When such extensions of *Miranda* have been proposed, this Court and other courts have firmly and uniformly rejected them on the basis that "[t]he Court has never held, and we decline to do so now, that the requirements of [*Miranda*] must be met to render pretrial statements admissible in other than criminal

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[3] Respondent argues that the government's reference in the question presented to "the warnings prescribed by *Miranda*," see Pet. i, somehow "implicitly acknowledges that *Miranda* includes a warning requirement, and that it is not just an evidentiary rule." Resp. Br. 45 n.14. It is undoubtedly true that *Miranda* "prescribed" certain warnings that must precede custodial interrogation if the resulting statements are to be admissible in the government's case in chief. That does not mean that *Miranda* established a rule governing police conduct for any other purpose.

cases." *Baxter* v. *Palmigiano*, 425 U.S. 308, 315 (1976).[4] The underlying reasoning is that, because *Miranda* addresses the dangers of undetected compelled self-incrimination at trial, it can have no logical application to proceedings other than a criminal trial. There is therefore no need to weigh deterrence concerns as in the Fourth Amendment context. That analysis too establishes the error of respondent's premise that *Miranda* sets forth a rule governing police conduct outside trial and that the rule should be extended to derivative evidence in order to achieve a greater level of deterrence.

Indeed, in *Oregon* v. *Elstad*, the Court recognized the "fundamental differences between the role of the Fourth Amendment exclusionary rule and the function of *Miranda* in guarding against the prosecutorial use of compelled statements as prohibited by the Fifth Amendment." 470 U.S. at 304. As the Court noted in *Dickerson*, *Elstad* "refus[ed] to apply the traditional 'fruits' doctrine developed in Fourth Amendment cases" because it recognized that "unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth [Amendment]." *Dickerson*, 530 U.S. at 429.

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[4] See *United States* v. *Nieblas*, 115 F.3d 703, 705-706 ((9th Cir. 1997) (parole revocation); *United States* v. *Solano-Godines*, 120 F.3d 957, 960-961 (9th Cir. 1997) (deportation hearing), cert. denied, 522 U.S. 1061 (1998); *Bustos-Torres* v. *INS*, 898 F.2d 1053, 1056-1057 (5th Cir. 1990) (same); *United States* v. *MacKenzie*, 601 F.2d 221, 222 (5th Cir. 1979) (probation revocation), cert. denied, 444 U.S. 1018 (1980); *Cheng Chen* v. *INS*, 537 F.2d 566, 568 (1st Cir. 1976) (same); *DMV* v. *McLeod*, 801 P.2d 1390, 1392 (Nev. 1990) (driver's license revocation hearing); *Balsz* v. *Department of Pub. Safety*, 366 N.W.2d 492, 494 (S.D. 1985) (same); *Brewer* v. *DMV*, 595 P.2d 949, 951 (Wash. 1979) (same); *State* v. *Aldus*, 704 A.2d 386, 387 (Me. 1998) (civil proceeding).



### C. The *Miranda* Rule Need Not Be Extended Now—After 37 Years—To Require The Exclusion Of Derivative Evidence

Although respondent presents (Br. 22-30) its fruits rule as indispensable to effectuating *Miranda*, the *Miranda* rule has achieved its purposes for nearly four decades, while this Court has declined to apply a fruits rule in the only cases presenting that question, and the overwhelming authority in the courts of appeals has expressly rejected extending the *Miranda* rule to suppress evidence derived from unwarned statements. The virtually complete absence of a derivative evidence rule during that time refutes respondent's argument that extending *Miranda* to incorporate such a rule is essential or appropriate now.

1. The *Miranda* rule has always been limited to the exclusion of unwarned statements themselves from the prosecution's case in chief. With two exceptions, all of this Court's *Miranda* cases arose when defendants challenged the admissibility of their allegedly unwarned statements at trial. In each of the two exceptions—*Michigan* v. *Tucker* and *Oregon* v. *Elstad*—the Court declined to extend *Miranda* to preclude the admission of evidence that was attacked as the "fruit" of an unwarned statement. Now, 37 years after *Miranda* announced its "core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief," *Dickerson*, 530 U.S. at 443-444, this Court should reject respondent's attempt to extend the *Miranda* rule beyond that core to suppress evidence derived from unwarned statements.

The Court's reasoning in *Elstad* makes clear that the *Miranda* rule is appropriately viewed as—and limited to—a protection against the risk of the introduction at trial of compelled statements. As the Court explained, "the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied

* * * by barring use of the unwarned statements in the case in chief." 470 U.S. at 318. The Court therefore noted that, although *Miranda* requires that unwarned statements be presumed compelled for purposes of the prosecution's case in chief, *Miranda* "does not require that the statements *and their fruits* be discarded as inherently tainted." *Id.* at 307 (emphasis added). Accordingly, the reasons for refusing to apply suppression apply "with equal force when the alleged 'fruit' of a noncoercive *Miranda* violation" was "a witness," "*an article of evidence*," or "the accused's own voluntary testimony." *Id.* at 308 (emphasis added).[5]

2. The courts of appeals also declined to adopt a broad derivative evidence rule under *Miranda* before *Dickerson*, and the Tenth Circuit is the only court to change its view since *Dickerson* was decided. That consistent line of precedent refutes respondent's claim that a broad "fruits" rule is necessary to achieve the purposes of *Miranda*.

Before *Dickerson*, at least eight courts of appeals (including the Tenth Circuit) had concluded that *Miranda* did not require the suppression of physical evidence derived from an unwarned statement.[6] The First Circuit, while rejecting a broad rule suppressing derivative evidence in "ordinary" *Miranda* cases, had held in *United States* v. *Byram*, 145 F.3d 405, 409 (1998), that suppression could be warranted where "the events * * * are unusual." No court of appeals had agreed with respondent's position that suppression of the fruits of an unwarned statement was generally necessary or appropriate.[7]

After *Dickerson*, while the Tenth Circuit in this case did adopt a broad fruits rule, the Third Circuit joined the other courts of appeals in holding that *Miranda* did not warrant suppression of derivative evidence. See *United States* v. *DeSumma*, 272 F.3d 176, 180 (3d Cir. 2001). The Eighth Circuit also recently rejected the Tenth Circuit's reasoning and reaffirmed its pre-*Dickerson* holding that suppression of physical fruits is unwarranted. *United States* v. *Villalba-Al-*

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[5] Respondent's efforts to explain away those statements in *Elstad* (Br. 41-42) are unconvincing. For example, respondent relies (Br. 43) on the dissent's cautionary reading of the *Elstad* majority opinion as a basis for disagreeing with the majority's explicit mention of the lack of need to suppress "an article of evidence." 470 U.S. at 307. The dissent's analysis, however, cannot override the language and meaning of the Court's opinion. More generally, respondent's characterization (Br. 40, 41) of the Court's statements in *Elstad* as "opaque" and "passing reference[s]" does not alter the fact that one strand of the Court's reasoning in *Elstad* was that "*Miranda* sweeps more broadly than the Fifth Amendment itself," 470 U.S. at 306, and therefore does not mandate a broad rule requiring the suppression of the fruits of unwarned statements. 470 U.S. at 307-308.

[6] In addition to cases from the Second, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits cited in the government's opening brief (at 37-38 n.12), the Eighth Circuit had also held that *Miranda* did not warrant suppression of evidence derived from unwarned statements. See *United States* v. *Wiley*, 997 F.2d 378, 383 (8th Cir.), cert. denied, 510 U.S. 1011 (1993), overruled on other grounds by *United States* v. *Bieri*, 21 F.3d 819, 823 (8th Cir.), cert. denied, 513 U.S. 878 (1994).

[7] In *Patterson* v. *United States*, 485 U.S. 922 (1988), Justice White dissented from the denial of certiorari on "the question of the admissibility of physical evidence obtained as a result of an interrogation conducted contrary to the rules set forth in *Miranda*." *Id.* at 922. He argued that there was a conflict in the circuits on the issue, but he cited only three cases, all of them dating from well before this Court's decision in *Elstad*, for the proposition that derivative evidence should be suppressed. One was *United States* v. *Castellana*, 488 F.2d 65, 67 (5th Cir. 1974), but the panel's decision in that case had been vacated and overruled by the en banc Fifth Circuit. See *United States* v. *Castellana*, 500 F.2d 374 (1974). The en banc Fifth Circuit later held that "[a] violation of *Miranda* rules * * * necessitates only the exclusion of testimonial evidence from the prosecution's case in chief" and that "nontestimonial physical evidence * * * would not be excludable" under *Miranda*. *United States* v. *Bengivenga*, 845 F.2d 593, 600-601 (5th Cir.), cert. denied, 488 U.S. 924 (1988). The other two cases cited by Justice White were *Commonwealth* v. *White*, 371 N.E.2d 777 (Mass. 1977), aff'd by an equally divided Court, 439 U.S. 280 (1978), and *State* v. *Preston*, 411 A.2d 402, 407-408 (Me. 1980).

*varado*, No. 02-3101 (Oct. 10, 2003). The Fourth Circuit has similarly reaffirmed its pre-*Dickerson* rule. *United States* v. *Sterling*, 283 F.3d 216, 218-219 (2002). The First Circuit in *United States* v. *Faulkingham*, 295 F.3d 85, 93 (2002), petition for cert. pending, No. 02-7385 (filed Oct. 7, 2002), concluded that a suppression remedy depends on "weighing the reliability of the unwarned derivative evidence against the need for deterrence"—a balance that results in no suppression when, as in *Faulkingham* and this case, the *Miranda* violation was inadvertent and the derivative evidence is highly reliable physical evidence. Accordingly, eight courts of appeals at present have recognized that the *Miranda* rule does not require the suppression of derivative evidence, and the First Circuit would likely reach the same conclusion in a case like this one. The Tenth Circuit in this case has been the only court of appeals that has taken the opposite view.[8]

Chief Justice Burger commented in his opinion concurring in the judgment in *Rhode Island* v. *Innis*, 446 U.S. 291, 304 (1980), that the Court should not "overrule *Miranda*, disparage it, nor extend it at this late date." The experience of this Court and of the lower federal courts is that the *Miranda* rule has adequately served its purpose by preventing the introduction at trial of possibly compelled statements made during custodial interrogation. The expansion proposed by respondent would be a major shift in *Miranda* jurisprudence.

### D. There Is No Adequate Deterrence-Based Justification for Extending The *Miranda* Rule

1. Respondent argues that excluding evidence derived from unwarned statements is necessary to ensure that police

[8] The Eleventh and D.C. Circuits have not directly spoken to the issue, but neither of them has excluded evidence that is the fruit of an unwarned statement.



officers do not intentionally refrain from giving *Miranda* warnings (Br. 22-25). He further contends that such exclusion is particularly important in cases involving physical evidence derived from unwarned statements (Br. 25-28), and that "even within the category of physical evidence fruit, there is a greater need for deterrence where the physical evidence constitutes the very essence of the offense" (Br. 27). As noted above, the *Miranda* rule protects the core Fifth Amendment right at trial and is not based on the need to prevent the police from committing violations of the Constitution outside the courtroom. But even if *Miranda* were in part justified by a deterrence rationale, respondent's arguments would be mistaken.

First, the *Miranda* rule itself, without the addition of a rule suppressing derivative evidence, provides a strong incentive to police to give *Miranda* warnings, as it has for the nearly four decades since *Miranda* was decided. At the time they take a suspect into custody, police officers ordinarily will not know whether any statements the suspect might make will prove necessary, merely useful, or entirely superfluous at an ultimate trial of the suspect. If they fail to give *Miranda* warnings, they take the risk that the opportunity for conviction will be lost because the suspect will make statements that would turn out to be necessary for conviction but that must nonetheless be suppressed under *Miranda*. See U.S. Br. 33.

Second, police officers who fail to give *Miranda* warnings take the additional risk that the suspect's statements will ultimately be found to be involuntary, thus requiring the suppression of the statements *and* derivative evidence. Because it will be a rare case in which *Miranda* warnings are administered and the suspect nonetheless is able to establish that his subsequent statements were involuntary, see, *e.g.*, *Dickerson*, 530 U.S. at 444, police officers have an incentive to administer *Miranda* warnings and thereby avoid the pos-

sible suppression of the confession and its fruits on involuntariness grounds.[9] See U.S. Br. 16-17.

Third, respondent's suggestion (Br. 25-28) that it is particularly important to suppress physical evidence derived from unwarned statements is directly at odds with the truthseeking function of criminal trials. "[C]oerced confessions are inherently untrustworthy," *Dickerson*, 530 U.S. at 433, and suppression of an accused's unwarned statements helps avoid the risk that such unreliable evidence will be introduced at trial. Physical evidence, however, is likely to be reliable regardless of whether it was obtained as the result of unwarned statements. Accordingly, suppression of such evidence imposes greater costs on the truthseeking function of the trial, and those higher costs refute respondent's contention that such evidence should be suppressed under *Miranda*. See U.S. Br. 35-36.

Finally, respondent's assertion that "there is a greater need for deterrence where the physical evidence constitutes the very essence of the offense" (Br. 27) suggests a regime in which the importance of the evidence in each case determines whether it must be suppressed. Such a regime would entangle the courts in difficult collateral litigation in each case to sort out just how central each piece of allegedly derivative evidence is to the government's case. Moreover, even in possession cases like this one, the government must connect the possessed item with the defendant. Although that connection will be obvious in some cases in which the forbidden item is found in a location closely connected to the

[9] Amicus Brennan Center argues (Br. 15-16) that cases in which law enforcement officers intentionally withhold *Miranda* warnings in the hope of acquiring derivative evidence reveal the need for additional deterrence in the form of a suppression remedy. See also *Missouri* v. *Siebert*, No. 02-1371 (to be argued Dec. 9, 2003). Not only are such cases comparatively rare, but some of Amicus's own citations reveal the danger that an unwarned statement will ultimately be found involuntary.



defendant, in other cases the defendant's statements will be a necessary part of the proof connecting the possessed item with the defendant. Police officers retain an incentive to give *Miranda* warnings, because they otherwise take the risk that they will be unable to make the necessary connection at trial between the physical evidence and the defendant. See U.S. Br. 34-35.

2. Amicus Brennan Center suggests (Br. 21) that derivative evidence should be suppressed when police officers have engaged in an "objectively unreasonable" failure to give *Miranda* warnings. An objectively unreasonable failure of a police officer to give *Miranda* warnings does not, however, mean that a suspect's ensuing statements are actually compelled. Nor does it have any bearing on the reliability of the evidence derived from the suspect's statements. Respondent's suggestion therefore is not tied to the central concerns of the Self-Incrimination Clause.

In addition, drawing a line between reasonable and unreasonable failures to give *Miranda* warnings would entangle the courts and the parties in unproductive and unnecessary litigation. Courts would be called on not merely to decide whether *Miranda* warnings were necessary and whether they were in fact given in a particular case. They would also have to grapple with the reasonableness of an officer's determination that the defendant was not in custody, see *Oregon* v. *Elstad*, 470 U.S. at 308, that he had not been interrogated, see *Rhode Island* v. *Innis*, 446 U.S. at 297-304, that he had not invoked his right to remain silent or to consult an attorney, see *Davis* v. *United States*, 512 U.S. 452 (1994), that the case fell within the public safety exception, see *New York* v. *Quarles*, 467 U.S. 649, 654 (1984), or that the warnings were in fact adequately given, see *Duckworth* v. *Eagan*, 492 U.S. 195 (1989). This Court should not require the lower courts to add that additional layer of litigation to determinations about the admissibility at a criminal trial of highly reli-

able physical evidence that has not been shown to be the product of compelled statements.

3. This case illustrates the high costs of extending the *Miranda* rule to require the suppression of physical evidence. After arresting respondent, the police officer in this case began to give him *Miranda* warnings. The officer got as far as informing respondent of his right to remain silent when respondent said that he knew his rights. Pet. App. 4a. The police officer then inquired again whether respondent knew his rights, and respondent answered in the affirmative. J.A. 40, 46. At that point, the officer told respondent that he was interested in respondent's guns. J.A. 41. Respondent stated that he might not be willing to say anything about his Glock pistol "because I don't want you to take it away from me." *Ibid.* The officer then told respondent that "[i]n order to be truthful about this whole matter * * * I need to know about the Glock." *Ibid.* He also said that "to get in front of [respondent's] domestic violence case," respondent "needed to be truthful regarding the location of his firearm." J.A. 48. Respondent then informed the officer where the Glock was located. J.A. 41, 93.[10]

[10] Amicus Brennan Center, but not respondent, suggests (Br. 5) that the officer's conduct could be "an egregious violation of *Miranda*," or at least that his statements were "a form of cajolery that *Miranda* specifically prohibits *prior* to waiver." Those assertions are without foundation. Of the three cases amicus cites, two involve police conduct that could be construed as threats made after the defendant invoked or appeared to invoke his desire for counsel under *Edwards* v. *Arizona*, 451 U.S. 477 (1981). See *Collazo* v. *Estelle*, 940 F.2d 411, 417 (9th Cir. 1991) (en banc) (officer's statements were a "textbook violation of *Edwards*"); *Commonwealth* v. *Gibbs*, 553 A.2d 409, 155 (Pa. 1989) (similar). The rules governing police conduct after the invocation of counsel under *Edwards* are not at issue in this case, because respondent never invoked his right to counsel. In the other case cited by amicus, *United States* v. *Pinto*, 671 F. Supp. 41 (D. Me. 1987), the district court found that the confession was involuntary, relying on the proposition that threats or promises by the police necessarily make a confession involuntary. *Id.* at 46-57. This Court has since rejected that proposition. See *Arizona* v. *Fulminante*, 499 U.S. 279, 285 (1991). More relevant than the cases cited by amicus are the numerous cases in which courts have held that police statements about leniency did not make a defendant's *Miranda* waiver invalid. See, *e.g.*, *Alston* v. *Redman*, 34 F.3d 1237, 1253-1254 (3d Cir. 1994) (police promise that plea bargain would be recommended to the prosecutor); *United States* v. *Bye*, 919 F.2d 6, 9-10 (2d Cir. 1990) (police statement about the benefits of early cooperation; citing cases); *United States* v. *Garot*, 801 F.2d 1241, 1245-1246 (10th Cir. 1986) (police promise to tell the prosecutor about defendant's cooperation); *United States* v. *Baldacchino*, 762 F.2d 170, 179 (1st Cir. 1985) (promise "to bring any cooperation on the part of the defendant to the prosecuting attorney's attention").



The government has conceded that the officer's failure to administer the remaining *Miranda* warnings was a deficiency under the *Miranda* rule that would result in the suppression of respondent's statement. Pet. App. 4a. But the deficiency in all likelihood had little or no effect on respondent's willingness to speak with the police. A defendant who is so anxious to talk with the police that he takes the initiative to interrupt the warnings and insist that he knows them already is likely to speak even if the officer had completed the *Miranda* warnings. Accordingly, the events that ensued in this case, including respondent's statements to the police, likely would have been the same had the full set of warnings been administered. The court of appeals nevertheless would have the technical failure to administer the *Miranda* warnings in this case result in suppression of the gun, thus likely precluding respondent's prosecution. The cost of precluding prosecution altogether is a high one, and that factor weighs heavily against respondent's proposed extension of the *Miranda* rule.

When this Court reaffirmed *Miranda* as a constitutional rule in *Dickerson*, it understood that the suppression of some unwarned, voluntary statements would result in guilty defendants going free. 530 U.S. at 444. But the Court was

willing to accept that result in part because "subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement." *Id.* at 443. The extension proposed by respondent would upset the balance struck in *Dickerson* and significantly magnify the adverse impact of *Miranda*.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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*Solicitor General*

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